United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original Affidavit of Mailing

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To be argued by
BRUCE F. SMITH

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1350

UNITED STATES OF AMERICA,

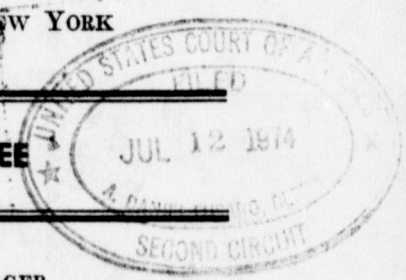
Appellee,

—against—

WILLIAM MICHAEL FARUOLO and
ANTHONY BERNARDEZ,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE APPELLEE

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Preliminary Statement

Anthony Bernardez and William Michael Faruolo appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Neaher, *J.*), entered March 8, 1974, following their pleas of guilty to conspiracy to possess goods stolen in interstate commerce in violation of Title 18, United States Code, Section 371.* Appellant Bernardez was sentenced

* On December 19, 1972, appellants and John Joseph Pastore, Richard Marc[illegible], Jr., Frank Vincent Felumero, Vincent DiModica, Lester Benjamin Sellitti and Joseph Edward Bruns were charged in a two count indictment with possession of women's apparel stolen from a motor truck moving in interstate commerce (18 U.S.C. § 659) and with conspiracy to possess the same (18 U.S.C. § 371).

[Footnote continued on following page]

to a probationary term of three years to commence upon his release from state prison. Appellant Faruolo was sentenced to a probationary term of five years, with a special condition that he seek business counseling under the supervision of the Probation Department.

On their appeal, appellants jointly claim that Faruolo's consent to search his home was not given freely and voluntarily and that, therefore, the stolen goods uncovered in Faruolo's home should have been suppressed.

Statement of Facts

A. The Government's Case

Prior to trial counsel for the defendants moved to suppress all physical evidence seized at the time of the arrest * and the two succeeding days thereafter. At the suppression hearing held on November 1, 1973, Special Agent John Egan of the Federal Bureau of Investigation testified that on Thursday, August 10, 1972, he received a report of a hijacking of a truckload of women's wearing apparel on that same day from a truck owned by Interstate Dress Carriers, Inc. ("Inter-

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Following the denial of the suppression motion, counsel for all the defendants and the Assistant United States Attorney stipulated that the defendants could plead guilty to Count Two of the indictment while preserving their right to appeal from the order denying the motion to suppress. Judge Neaher accepted the agreement. That procedure has been aproved by this Court. See *United States* v. *Rothberg*, 480 F.2d 534 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *United States* v. *Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

* At the close of the suppression hearing, Judge Neaher read findings of fact and conclusions of law into the record denying the motion to suppress. Those findings are found at pages 374-388 of the transcript of the suppression hearing and have been reproduced in Appellant Bernardez' Appendix, Tab "C", and the Appendix of Appellant Faruolo at 9a-24a. In addition, Judge Neaher ruled that Faruolo's confession was admissible and rendered a written memorandum reproduced in appellant Bernardez' Appendix, Tab "D".

state"). Egan interviewed the hijacked truck driver at the F.B.I. offices in New York and obtained a description of the hijackers and of the cargo (25-28).* A portion of the shipment had been packed in special containers called "Hangerpacks" which had the name "Hangerpack" printed on the outside of the box. On that same day, Egan spoke with an informant who on previous occasions had given Egan information which led to several arrests and recoveries of stolen merchandise. The informant told Egan that John Pastore had a load of stolen merchandise from the Interstate truck (28-30). Agent Egan, himself, knew John Pastore because Egan had arrested Pastore on several prior occasions in hijacking cases (41).

On Friday, August 11, 1972, Egan was told by another informant that "John Pastore's new partner was an individual from Staten Island whose first name was Richie, his last name unknown, and we were furnished with two telephone numbers where Ritchie [sic] could be located" (31-32). Egan looked up the numbers in a telephone cross reference directory which showed one number to be listed to Richard Marco, Sr., at 309 Dongan Hills Avenue,** Staten Island and the other was listed to Richard Marco, Jr., Seaview Avenue, Staten Island (32-33).

On Monday, August 14, 1972, Egan spoke with Special Agent Thomas Armstrong. Armstrong told Egan that over the weekend he had spoken to one of his informants who stated that "John Pastore had a load of clothing and he was furnished a telephone number where Pastore could be contacted" (34). Egan checked out that telephone number and found it was listed to Richard Marco, Jr. (34).

On the same day, Monday, August 14, 1972, Agent Egan took up a surveillance position near Richard Marco,

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* Page numbers in parenthesis refer to the transcript of the suppression hearing.

** Throughout the transcript the reporter incorrectly reported the street as "Donegal" Hill Road.

Sr.'s residence and observed a U-Haul rental truck parked in front of 309 Dongan Hills Avenue with a lock on the back of the truck (35). At approximately 11:13 A.M. the truck pulled away from 309 Dongan Hills Avenue with a single occupant, followed by a green Cadillac bearing New Jersey license plates (37). Egan followed the truck across Staten Island and towards the Bayonne Bridge when he lost sight of it for a short time, but then rediscovered it parked in front of 14 La Salle Street, Staten Island, appellant Faruolo's residence (37-38, 53). Egan observed boxes and cartons, some bearing the legend "Hangerpack" being unloaded from the truck and being placed into the side door of the house at 14 La Salle Street by Faruolo, Faruolo's son and the defendant's Sellitti, DiModica and Richard Marco, Jr. (38, 42). Egan observed this operation for about an hour (39).

At 12:45 P.M. the truck, driven by Richard Marco, Jr., was driven away from 14 La Salle Street and was followed by a Pontiac bearing New York license plates and occupied by the defendant's DiModica and Sellitti (39-40). Egan followed the truck and Pontiac to 309 Dongan Hills Avenue where the truck was parked and Marco got out of the truck and climbed into the Pontiac. Egan then followed the Pontiac to the Country Club Diner on Highland Boulevard and Clove Road on Staten Island (40). When Egan entered the diner he observed Marco, DiModica and Sellitti talking with John Pastore (40).

Approximately five or ten minutes after observing the meeting in the Country Club Diner, Egan and Special Agent William J. Edwards observed Pastore and Marco get in Pastore's 1972 red Cadillac and drive away (41-42, 147).

About five or ten minutes later Egan observed Pastore alone in Pastore's car in the vicinity of 45 Vera Street, Staten Island. Another U-Haul truck was parked in front of 45 Vera Street and other agents observed the passenger in Pastore's car get out, climb into the truck, and drive the truck to 309 Dongan Hills Avenue (44).

The other two individuals, DiModica and Sellitti, who had been at the meeting at the Country Club Diner, were observed by Agent Edwards to get into a blue Pontiac Bonneville and drive to an intersection eight or ten blocks away where they met the occupants of a green Dodge Dart. DiModica got out of the Bonneville and spoke to the defendant Felumero (147-148). DiModica then got back in the Bonneville, Felumero got back in the Dart with two other occupants, and the defendant Felumero followed DiModica and Sellitti to 309 Dongan Hills Avenue where the second U-Haul truck was parked. The two cars then followed the second U-Haul truck across Staten Island to 14 La Salle Street, appellant Faruolo's home (43-44, 148-149).

At 14 La Salle Street Special Agents Egan and Edwards observed a number of individuals, including Faruolo and Felumero, unloading large brown cartons with the words "Hangerpack" on them and hanging garments wrapped in plastic from the U-Haul truck and carrying them into the side door of the house (44-45, 150-51, 158-159).

At approximately 3:30 or 4:00 in the afternoon Sellitti started to drive the U-Haul truck away from 14 La Salle Street and a number of individuals came out of the house and got into the green Dodge Dart and the green Cadillac (47, 160). The agents then moved in to make the arrests.

Initially, Felumero and DiModica were arrested in the green Cadillac (161). Agent Edwards went around to the back of the house with his gun drawn. In the backyard, he found Faruolo standing next to a blue panel truck. Edwards observed that the truck was fully packed with hanging garments and that there were folded up brown cartons on the ground with the words "Hangerpack" written on them (49-51, 161-62). Edwards told Faruolo he was under arrest and asked him to go and sit on the picnic table: "I advised him that he had a right to remain silent; advised him that he had a right to contact an attorney; advised him that anything he said could be used against

him in court. I advised him that he did not have to say anything and I also, after giving him those rights, I told him that I didn't want him to say anything at that time except I asked him his name, which he told me was William Faruolo, and I asked him if he was the owner of that particular house, and he said that he was" (162).* Edwards had his gun drawn for several minutes until he considered the situation to be under control. Thereafter, when Agents Egan and Thomas Armstrong came into the backyard he reholstered the gun (52, 163).** Edwards did not search Faruolo (163).

When Egan arrived, he observed Faruolo seated at the picnic table: "I advised him [Faruolo] who I was. I advised him that we were investigating a hijacking and that we had had his house under observation all day, and I asked him would he permit us to search his house" (53). Egan also told Faruolo that he didn't have to let the agents search the house if he didn't want to (53). Egan then filled out a consent to search form and then read it to Faruolo (55-56). Faruolo said to Egan that he didn't know whether he should sign the form or not (57). Egan told Faruolo he didn't have to allow the agents to search the house but that the agents could get a search warrant, although probably not that late in the afternoon. The agents, therefore, would have to guard the house all night (57).*** Faruolo took the form, read it, said he understood

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* Judge Neaher found, in Finding Six, that Edwards failed to warn Faruolo that he had the right to have counsel appointed for him if he could not afford counsel (375).

** Judge Neaher found that Edwards reholstered the gun upon Egan's arrival (Finding Three [375]). The Judge also found that Faruolo was not "scared" (Finding Twenty-one [378]).

*** Judge Neaher found the facts substantially as related by Egan in Findings Eight to Eleven, (375-376). Judge Neaher also stated "the Court believes that there was sufficient basis for him to believe that a warrant could be obtained. He [Egan] was not engaging in deceit or trickery.

There was, in fact, sufficient basis for obtaining a warrant" (385).

it, and after thinking about it for a minute to a minute and a half, signed it (57-58).*

After Faruolo signed the consent to search in his backyard, he went into his house and consented to an interview by Special Agent Charles R. Steadman. Faruolo was given the complete *Miranda* warnings and in the course of the interview admitted that he knew the merchandise was stolen (219-226). Faruolo then said he would like to speak to his attorney before answering anymore questions (226). All questioning ceased at that time.

B. The Defense Case

Appellant Faruolo testified that he was confused and scared when Edwards pointed the gun at him and placed him under arrest (255, 267-271). Faruolo stated that no threats or promises were made to him (256), but that the

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* The consent form stated:

8/14/72
Staten Island, New York

I, William Faruolo, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize John K. Egan, Thomas Armstrong, and William Edwards, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at 14 La Salle Street, Staten Island. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(SIGNED)
/S/ William Faruolo

WITNESSES:
S.A. William J. Edwards, F.B.I. 8/14/72, Thomas Armstrong, S.A. F.B.I. 8/14/72, John K. Egan, S.A. F.B.I., New York, N.Y. 8/14/72.

agents said they could lock up Faruolo's son and wife if Faruolo didn't sign the consent to search (257-258).*

ARGUMENT

The District Court properly found that appellant Faruolo's consent to search his home was freely and voluntarily given.

Appellants' contend that the Government failed to show by "clear and convincing evidence" that Faruolo voluntarily and freely consented to the search of his home.**

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* Judge Neaher found:

"Twelve, Egan did not state that Faruolo's wife or son would be prevented from leaving the house in such a case. Nor did he, or any other agent, threaten that either wife or son would or could be arrested. The Court disbelieves Faruolo's statements and inferences to the contrary" (376).

"Nineteen, at no time prior to giving consent to the search, were any statements made by the agents which threatened or could have been viewed as threatening to Faruolo's wife or son" (377).

"Twenty-one, Faruolo, prior to granting consent, had no cause to be in apprehension for his own safety or that of his family. The Court does not believe that Faruolo was "scared," and finds him to have been no more anxious than any other person placed under arrest while in the act of committing what was charged to be criminal activities" (378).

** Appellant Bernardez has stated in his brief at page 10 that he has standing to challenge the search of Faruolo's home. While the government did represent before the District Court that it would not contest the standing of the defendants to challenge the consent to search (425-426) and the government does not wish to reverse its position at this time, it would be remiss in not responding and pointing out that an issue of standing does exist with respect to Bernardez. In *Brown* v. *United States*, 411

[Footnote continued on following page]

Appellants urge that his arrest, at gunpoint, created an insurmountable burden on the Government to show that the standards of *United States* v. *Mapp*, 476 F.2d 67 (2d Cir. 1973), had been met. They argue, as well, that Agent Egan misrepresented his ability to obtain a search warrant for the premises, thereby exacerbating an otherwise coercive situation. In addition, appellant Faruolo separately urges that the full *Miranda* warnings must be given prior to obtaining an otherwise valid consent to search and that the agent's failure to advise him of his right to have counsel appointed foredoomed any possibility of a valid consent.*

U.S. 223 (1973), the Supreme Court rejected the "automatic standing" concept of *Jones* v. *United States*, 362 U.S. 257 (1960), where the defendant: (a) was not on the premises at the time of the contested search and seizure; (b) he alleged no proprietary or possessory interest in the premises; and (c) was not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. See also, *United States* v. *Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973). Bernardez' plea to the conspiracy count in no way relieved him of the requirement of showing standing. Since possession is not an essential element of conspiracy to possess, *United States* v. *Cotham*, 363 F. Supp. 851, 853 (W.D. Tex. 1973), Bernardez has no standing. Bernardez gains no benefit from *United States* v. *Mapp*, 476 F.2d 67 (2d Cir. 1973) because *Brown* rejected the "automatic standing" afforded a "target" and Mapp gained standing because he was charged with possession whereas Bernardez pleaded guilty to a conspiracy charge and was not a "target" of the investigation. Finally, Bernardez was not present when the search was made.

* Prior to trial the defendants moved to suppress the physical evidence and throughout the suppression hearing the parties treated the question of evidence found inside Faruolo's house, the evidence found in plain view in the backyard, as well as Faruolo's statements to Agent Steadman, as covered by the suppression motion. Nevertheless, Judge Neaher noted in his decision denying the suppression motion that the defendants argument that there was insufficient probable cause to justify the backyard arrest (and therefore, the entry onto Faruolo's property) was not pursued at the hearing (386). Judge Neaher also noted

[Footnote continued on following page]

Numerous decisions have found valid consents under custodial circumstances notwithstanding the "heavy burden" that the Government faces in establishing the propriety of the consent. See, *United States* v. *Gaines*, 441 F.2d 1122 (2d Cir.), *cert. granted, judgment vacated and remanded*, 404 U.S. 878 (1971), *on remand*, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Jordan*, 399 F.2d 610 (2d Cir.), *cert. denied*, 393 U.S. 1005 (1968); *Gorman* v. *United States*, 380 F.2d 158 (1st Cir. 1967); *United States* v. *Bracer*, 342 F.2d 522 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *United States* v. *Smith*, 308 F.2d 657 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); *United States* v. *Paradise*, 253 F.2d 319 (2d Cir. 1958); see generally, Annot: *Valadity of Consent to Search Given by One in Custody of Officers*, 9 A.L.R. 3d 858, 880-886 (1966).

In the case at bar, appellant Faruolo's consent was "unequivocal, specific, and intelligently given," *United States* v. *Smith, supra*, 308 F.2d at 663, and "not the result of duress or coercion, express or implied," *Schnechloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973). Faruolo was placed under arrest in his own backyard and was advised of his *Miranda* rights, with the exception of a warning that he had the right to have counsel appointed if he could not afford counsel (See, Findings Five and Six [375]). The gun, which was drawn when Faruolo was first arrested, was reholstered and an atmosphere of calm prevailed (See Findings Two, Three and Four [374-375]). The agents asked Faruolo's permission to search his house, orally told him he did not have to grant his permission,

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that the items discovered in the backyard were not a product of the consent to search (393-94). Therefore, the sole issue raised on appeal is the decision by the District Judge denying the motion to suppress the evidence seized in appellant Faruolo's house by virtue of the consent to search. The admissibility of the other evidence seized, as the Government understands appellants' briefs, is not contested.

and further that the house would not be searched without his permission. Moreover, those same warnings were embodied in a consent to search form that was given to Faruolo and which he read (See Findings Eight, Nine and Thirteen [375-376]). No attempt was made to interrogate, threaten or handcuff Faruolo, and he was not "scared" (See Findings Eighteen, Nineteen, Twenty and Twenty-One [377-378]).* On those facts, Judge Neaher properly concluded that the drawn gun had no lasting effect. There is no basis for concluding that he submitted to the authority of the agents. His consent was a reasoned response to a difficult situation of his own making.

Appellants argue, however, that Faruolo's "will to resist giving consent to search his house was overcome in part by Egan's misrepresentation of his authority to obtain a search warrant" (Appellant Bernardez' Brief, p. 12). Stating that they rely on *United States* v. *Jordan, supra* and *United States* v. *Curiale*, 414 F.2d 744 (2d Cir. 1969), appellants urge that Agent Egan's "misrepresentation" and "threat" that he could obtain a search warrant necessarily rendered the consent involuntary.

The *Jordan* and *Curiale* cases, quite apart from further supporting the conclusion that Faruolo's consent was voluntary, hardly—even when taken strictly on their own terms—support the notion pressed by appellants that Agent Egan's statement that a warrant could be obtained turned an otherwise valid consent into one tainted by a coercive threat. In *Jordan*, a bank robbery prosecution, the defendant Jordan surrendered to FBI agents and was given the

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* It is settled that the findings of fact by the District Judge will be accepted unless clearly erroneous. *United States* v. *Curiale*, 414 F.2d 744, 747-48 (2d Cir. 1969); *United States* v. *Nardone*, 127 F.2d 521 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942); 3 Wright, Federal Practice and Procedure § 675, at 130, and cases cited therein. Appellants, for the most part, have ignored the District Court's findings of fact and have chosen instead, to simply trot out appellant Faruolo's testimony as the sole evidence in the case.

Miranda warnings before he stated to the agents, in the course of the interview, that "he had nothing to hide and that the agents could search his apartment if they wished to do so." Before gaining a signed consent to search from Jordan, one of the agents stated that a warrant could, in any event, be obtained.* Thereafter, Jordan signed the consent to search form. Remarking upon that statement by the agent, this Court stated (399 F.2d at 614): "Even if this last statement were held to be coercive, but see *Gatterdam* v. *United States*, 5 F.2d 673 (6th Cir. 1925), it would not vitiate the prior oral consent."

Of course, at bar, appellant Faruolo's consent to the search of his home, as Jordan's, was certainly not the product solely of Egan's representation, compare, *Bumper* v. *North Carolina*, 391 U.S. 543, 548-550 (1968).** It was, as the District Court found, a fully informed consent based upon Agent Egan's careful statements to him that he did not have to consent to the search.

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* The *Jordan* case contains no express discussion as to whether the agents possessed probable cause to obtain a warrant and search for the evidence eventually uncovered (a currency strap and several consecutively numbered bills). It appears, however, that there was no independent basis to search Jordan's apartment.

** At page 5 of appellant Bernardez' brief it is stated that Faruolo at first refused to sign the consent form and Agent Egan's testimony at page 55 of the suppression hearing transcript is cited. At page 11 of the brief it is further stated: "Egan filled out a Consent to Search form, but Faruolo refused to sign. At that point, Egan said that if Faruolo didn't sign the agents would keep the house under surveillance and return the following morning with a search warrant." No such testimony, however, was ever elicited from Egan and, indeed, Judge Neaher expressly found that Faruolo did not, at any time, refuse to sign the consent form or otherwise voice an objection to the search (see Findings Sixteen and Seventeen [377]). Moreover, appellant Faruolo's further statements at page 11 of his brief, concerning his fright, were also rejected by Judge Neaher (see Finding Twenty-One [378]).

The decision in *United States* v. *Curiale, supra,* is equally unsupportive of appellant's claims respecting Egan's representation. In *Curiale,* the agent had previously been informed by the United States Attorney's Office that there were not sufficient facts to justify an application for a search warrant. Thereafter, during the course of an interview with the defendant, the conceded purpose of which was to gain his signed consent for a search of his warehouse, the defendant stated: "If I don't sign this, you are going to get a search warrant." The agent did not dispute the defendant's apparent assumption but simply stated: "I don't want you to sign on that basis. If you are going to sign it, do it voluntarily." Thereafter, the defendant signed the consent. In disposing of the defendant's argument that his consent necessarily was the product of coercion, as set forth in *Bumper* v. *North Carolina, supra,* this Court found it unnecessary to consider the effect of the agent's failure to inform him that no search warrant would, or could be obtained. This Court stated (414 F.2d at 747):

> Curiale's statement concerning the search warrant demonstrated an awareness of his right to resist the agents' search in the absence of a warrant. Although he understood his right, he nevertheless chose to relinquish it.

Quite simply, the situation that prevailed in the *Curiale* case prevailed in the instant case. Agent Egan's statement that he would obtain a warrant also served to further impress upon appellant Faruolo his right to withhold his consent.

While it may be argued that the *Jordan* and *Curiale* cases leave open the question of whether a representation of the kind made by Agent Egan adds a coercive element to a consent to search situation they certainly do not imply that such statements are, by themselves, coercive. In all events, the decision of this Court in *United States* v. *Bracer,*

supra, more clearly implies the opposite; to wit: that where the arresting officers' representation that a search warrant will be obtained is a reasonable representation, made in good faith, a subsequent consent to search is not thereby tainted. See also, *Gatterdam* v. *United States,* 5 F.2d 673 (6th Cir. 1925) and *Simmons* v. *Bomar,* 230 F. Supp. 226, 229 (M.D. Tenn. 1964, and cases cited therein), *aff'd,* 349 F.2d 365 (6th Cir. 1965), *cf., United States* v. *Biswell,* 406 U.S. 311, 315 (1972). Indeed, as stated in the *Curiale* case, it seems that such a representation serves to heighten a defendant's knowledge of his constitutional right to withhold his consent. Thus, in *Bracer,* where the defendant consented to a search of his apartment following his lawful arrest and the agents' statement to him that "they would have to obtain a search warrant in order to search his apartment" (342 F.2d at 524), this Court stated, approvingly, that ". . . the consent was with knowledge that the agents could and would obtain a warrant, . . ." *United States* v. *Bracer, supra* at 525.

Appellants, however, in characterizing Agent Egan's statement that he would obtain a search warrant as a "misrepresentation" seem to imply that the agents could not, in fact, have obtained a search warrant for the stolen goods they had seen earlier placed into appellant Faruolo's home. Arrayed against such an implication of deceit is Judge Neaher's finding that Agent Egan was not engaging in deceit or trickery when he stated that a warrant could be obtained and that ". . . there was sufficient basis for him [Egan] to believe that a warrant could be obtained" (385). Moreover, there can be no question that probable cause did in fact, exist to search appellant Faruolo's house. That Egan's statement can be characterized as misrepresentations is so far beyond the record in this case as to be incredible.* Moreover, given the fact that Agent Egan

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*Egan's additional statement that he would secure the premises pending the arrival of the search warrant was equally well-founded. See, *Chambers* v. *Maroney,* 399 U.S. 42, 62 (1970) (Harlan, *J.*, concurring opinion.)

candidly informed appellant Faruolo that his house had been surveilled that entire day, it is sheer license to additionally characterize his statement as "threats." Quite simply, rather than constituting an element of coercion, Agent Egan's statement that a warrant could be obtained added a further basis upon which Faruolo could make an informed decision.*

Appellant Faruolo's final argument concerning the validity of his consent to search is based upon *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Appellant Faruolo, while recognizing that no Fourth Amendment warnings were required to have been given him (although, in fact, they were), see, *United States* v. *Mapp, supra,* at 77, *cf. Schneckloth* v. *Bustamonte, supra* ** nevertheless urges that the full *Miranda* warnings, which procedurally accompany his Fifth Amendment rights against self-incrimination, were required to have been intoned prior to the time he consented to the search. He argues that the

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* The irony of the appellants' position regarding Egan's statements about the warrant can, perhaps, best be appreciated in the hypothetical context of Egan's failure to advise Faruolo of an impending search warrant and Faruolo's refusal to consent to the search. In such a case, if Faruolo, upon realizing that a warrant was in the process of being obtained, were to consent to the search, one could hardly imagine coercion and lack of a voluntary consent. At bar, the result should hardly be different where the agent properly advised Faruolo of what would inevitably have come to pass if the agents were required to obtain a search warrant.

** The Government does not understand why the decision in *Schneckloth* v. *Bustamonte, supra,* is, as appellant Bernardez states (Brief, page 11, n.), inapplicable to the instant case simply because *Schneckloth* involved a non-custodial consent. Certainly, this Court has not considered the teachings of *Schneckloth* to be restricted to non-custodial consents, see *United States* v. *Ruiz-Estrella,* 481 F.2d 723, 727-728 (2d Cir. 1973), and has thus adhered to its own views expressed in *United States* v. *Mapp, supra,* 476 F.2d at 77, decided prior to *Schneckloth,* that the absence of warnings are not fatal to a custodial consent to search.

acts or words which amount to a consent to search are the constitutional equivalent of a confession or admission protected by the Fifth Amendment. Although appellant Faruolo does not expressly urge that *Wong Sun* v. *United States*, 371 U.S. 471 (1963) is applicable here, his basic contention seems to be fairly pregnant with the doctrine of that case.

It appears that appellant Faruolo is correct in stating that there are not any cases "which clearly stand for the principal of law" he asserts. One case, however, *Government of Virgin Islands* v. *Berne*, 412 F.2d 1055, 1059 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969), has stated in dicta, that: "If the validity of the search is conceived in the communicative assent of the accused, then the vice of self-incrimination is not dissipated because the search produces physical, as opposed to testimonial, evidence." The Court in *Berne*, however, reasoned that, because the defendant was not in custody at the time he consented to the search, no *Miranda* warnings were required.*

The initial difficulty with appellant Faruolo's contention, as well as the statement in the *Berne* case, is the decision of this Court in *United States* v. *Mapp*, *supra*, that warnings of Fourth Amendment rights need not necessarily be given to a person in custody in order to validate a consent search. It seems inconceivable, therefore, that *Miranda* warnings would, nonetheless, have to

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* The dicta of Berne does not appear to have been followed in any subsequent case, although in *United States* v. *Pelensky*, 300 F. Supp. 976 (D. Vt. 1969), the court, employing the same rationale, held that the defendant, unlawfully arrested, had to be given the *Miranda* warnings in order to validate the admission in evidence of a gun which he had given to the arresting officers upon their demand. See also, *United States* v. *Fisher*, 329 F. Supp. 630 (D. Minn. 1971); compare, *United States* v. *Kunkel*, 417 F.2d 299 (9th Cir. 1969).

be given. The second difficulty with appellant's position is that, appellant was, in fact, given all of the *Miranda* warnings save the advice that he was entitled to Court appointed counsel if he could not afford his own attorney. That omission was clearly inadvertant. Even in traditional Fifth Amendment contexts, this Court has refused to exclude confessions or other statements where *Miranda* has not been fully complied with. See, *United States* v. *Carneglia,* 468 F.2d 1084 (2d Cir. 1972), *cert. denied,* 410 U.S. 945 (1973); *United States* v. *Vanterpool,* 394 F.2d 697 (2d Cir. 1968).

The gravest difficulty, however, in accepting appellant Faruolo's contention, is its failure to distinguish between what the Supreme Court has recently stated to be the distinct privilege against compulsory self-incrimination on the one hand and, on the other, the "procedural safeguards associated with that right since *Miranda.*" *Michigan* v. *Tucker,* — U.S. — (42 U.S.L.W. 4887, 4890; decided June 10, 1974). In *Tucker,* the defendant was arrested for rape and given every warning required by *Miranda,* except, coincidentally, the one also not given to appellant Faruolo. During the interrogation which followed the defendant gave a false alibi stating that he had been with one Henderson during the period in issue. When Henderson was eventually interviewed, he not only discredited the defendant's alibi but supplied additional affirmative evidence of the defendant's guilt. At the trial which followed, the defendant's false statements of alibi during the interrogation were excluded but Henderson was permitted to testify as to those other facts which he had first disclosed when interviewed by the police. In the Supreme Court, the defendant urged, in effect, as does appellant Faruolo, that "the privilege against compulsory self-incrimination requires . . . that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial" (*id.*, at 4888).

In rejecting the defendant's contention, the Supreme Court found that "the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination . . ." (*id.*, at 4890).* In treating the affect of the failure to give the full *Miranda* warnings upon Henderson's testimony the Court held that: "Whatever deterrent effect on future police conduct the exclusion of those statements [Tucker's statements] may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well" (*id.*, at 4891).

Thus, in *Tucker,* the Court declined to extend the exclusionary rule to evidence derivatively obtained following incomplete *Miranda* warnings,** and, thereby, refused to, find a pendant "fruit" under the decision in *Wong Sun* v. *United States, supra.* Succinctly stated, the Government believes that the holding in *Tucker* necessarily forecloses acceptance of the dicta in the *Berne* decision and appellant Faruolo's contention. Certainly, no significant distinctions can be drawn between the use of a witness' testimony, as in *Tucker,* and the introduction in evidence of stolen contraband, as in the case at bar. It is by now well established that an individual may indeed be *compelled,* notwithstanding the values embodied in the self-

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* Appellant Faruolo does not claim otherwise with respect to his interrogation.

** The Government recognizes that the Court in *Tucker* consired it "significant" that Tucker's arrest occurred prior to the *Miranda* decision. Appellant Faruolo's arrest, of course, occurred well after the *Miranda* decision. Nevertheless, the agents in this case operated under the same kind of disability, for as noted by the Court in *Tucker,* (id., at 4891) there was no controlling precedent on the issue prior to *Tucker.* Moreover, appellant Faruolo concedes that there is no precedent which could have guided the agents as to the kind of warnings that had to be given appellant Faruolo prior to his consent. As it was, he was given full Fourth Amendment warnings.

incrimination clause, to give evidence, of a non-testimonial nature, that may assist law enforcement authorities in convicting him of a crime. See, *e.g., Schmerber* v. *California,* 384 U.S. 757 (1966) (blood samples); *Gilbert* v. *California,* 388 U.S. 263 (1967) (handwriting exemplars); *United States* v. *Dionisio,* 410 U.S. 1 (1973) (voice exemplars). As this Court observed in *Schmerber,* "the privilege [against self-incrimination] has never been given the full scope which the values it helps to protect suggest" (384 U.S. at 762).

Certainly, interrogation which elicits leads to other evidence does not offend those values any more than the compulsory taking of blood samples, fingerprints, or voice exemplars, all of which may be compelled in an "attempt to discover evidence that might be used to prosecute [a defendant] for a criminal offense" (*id.* at 761).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

July 10, 1974

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* The United States Attorney's Office wishes to acknowledge the assistance of Leslie Phillips Rudman, a third year law student at Hofstra University Law School in the preparation of this brief.

★ U. S. Government Printing Office 1974— 614—240—22

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
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James E. Eagan, Esq.
150 Broadway
New York, N.Y. 10038

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
606 United States Court House
Foley Square, N.Y., N.Y. 10007

Sworn to before me this
12th day of July 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
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Deborah J. Amundsen
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PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

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United States Attorney,
Attorney for _____

To:

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Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.

Dated: _____, 19____

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Attorney for _____

FPI-LC-5M-8-73-7355